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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON DANIEL BARRIOS,

Defendant and Appellant.

B236387

(Los Angeles County  
Super. Ct. No. GA082324)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Jason Daniel Barrios appeals the judgment entered following a jury trial which resulted in his conviction of attempted rape (Pen. Code, §§ 664/261, subd. (a)(2))<sup>1</sup> and assault with the intent to commit a felony (§ 220, subd. (a)(1)). The trial court sentenced Barrios to four years in prison. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *1. Facts.*

At about 11:00 a.m. on January 24, 2011, D.J. decided to go on her usual hike. She started on Pasadena Avenue in the City of South Pasadena and walked west along the Los Angeles River and the Arroyo by a golf course. That day she walked all the way to the Rose Bowl. When she arrived at the Rose Bowl, D.J. turned around and started back, walking along the same path she had taken there.

At about noon, D.J. was going to cross the street by a baseball field in the Arroyo Park area north of the 110 Freeway when she saw Barrios with a skateboard standing about 20 feet away, leaning against a fence. He appeared to be just “hanging out.”

D.J. took note of Barrios, then followed her usual route. She was on a horse trail, which she followed to go under a freeway overpass. However, as she approached the overpass, she heard Barrios “go on the skateboard behind [her].” D.J. went through the tunnel and followed the trail to an area lined on either side with trees. There, she “saw [Barrios,] with [his] skateboard coming in the opposite direction.” When she saw Barrios coming toward her, D.J. became “concerned.” The two individuals crossed paths and made eye contact. D.J., who was dressed in a white shirt, a crewneck, baggy black sweatpants and a big hat, said “ ‘Hello.’ ” Barrios then, still carrying his skateboard, crossed D.J.’s path. “[W]ithin a second, [he had] turned around and tackled [D.J.] from behind.” He pushed D.J. into a small clearing. It was like a football tackle from below the waist and D.J. landed on her hands and knees.

Barrios, who was on top of D.J., struggled with her and attempted to pull off her pants. D.J. asked Barrios what he was doing and continuously told him “ ‘No.’ ” After

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

five or six seconds, D.J. was able to turn around and face Barrios. He continued to try to take off her pants and her clothing began to tear. Barrios was on his knees, “trying to control the situation.” D.J. put her hands and knees up in an attempt to push Barrios away. When D.J. again told Barrios “ ‘No[,]’ ” he responded, “ ‘Please I need this. Please I need this.’ ”

As the two struggled, Barrios continued to tear at D.J.’s pants until her “hip and [her] butt” were exposed. D.J. told Barrios, “ ‘No I have children,’ . . . ‘please don’t do this.’ ” When Barrios, however, refused to stop, D.J. began to yell the word “ ‘No’ ” at him.

Several seconds later, D.J. heard a man’s voice call out “ ‘Hey what’s going on?’ ” Barrios stopped for a second, then resumed his attack on D.J. He continued to try to take off her pants. D.J. was surprised that Barrios “was continuing because [she] kn[e]w the trail and [] kn[e]w how quickly somebody [could] get into that area.” She continued to fight back and, although D.J. did not hear the voice again, Barrios suddenly got up, looked around, then ran back toward the tunnel, leaving his skateboard behind. D.J., who was feeling “[v]ery shakey,” got up, picked up the skateboard and walked away from the tunnel.

As D.J. walked toward her home, she encountered a friend and the mother of one of her son’s friends. D.J., who “was dirty[,]” had grass stains, dirt stains and ripped pants, told her friend about the attack and to “ ‘not go on the trail.’ ” D.J. did not call the police immediately after the incident because she “wanted to get home and away from the area. [She] didn’t want [Barrios] to see where [she] live[d]. [She] just didn’t want him to see [her] again.”

Tracy Green lives in the City of South Pasadena and knows D.J. One early afternoon in January 2011, Green, accompanied by her Golden Retriever, was going for a run down the Arroyo when she saw D.J. “coming out of the trail that runs right alongside a golf course” to the Rose Bowl. As Green was running with her dog, she heard D.J. tell her not to go into the Arroyo. When she stopped to talk to D.J., Green could tell that D.J.

was “clearly upset.” She was carrying a skateboard and her sweatpants were torn. D.J. told Green that a man had attacked her.

When Green told D.J. that she had her cell phone and that they should call the police, D.J. responded, “ ‘I’m afraid. I don’t want him following me. I have a daughter. I don’t want him coming after me. I’m leaving. I’m not staying around here.’ ”

Several hours later, D.J. received a call from police. She was asked to go to the South Pasadena Police Station and to bring her torn clothing and the skateboard with her. While she was at the station, D.J. was asked to view a lineup of approximately six men and to identify the person who had assaulted her on the trail. D.J. identified Barrios.

At trial, D.J. identified a photograph of Barrios. Although the photograph showed that he was wearing different clothes and had gotten a haircut since the day of the attack, D.J. recognized him as her assailant. On the day of the hike, he had been wearing black pants, and a “dark hoodie,” and his hair had been much longer.

With regard to injuries, D.J. indicated that she had suffered only “minor scrapes” around her “right thigh area” and her arm. During the attack, D.J. had repeatedly told Barrios “ ‘No.’ ” She told him “ ‘No’ ” between 30 and 40 times, yelling it out approximately 10 times. She also continuously pushed and “swat[ed]” at him. During the attack, Barrios did not touch D.J.’s breasts or genital area.

At approximately noon on June 24, 2011, Peter Aston was sitting on a bench in the Arroyo Park area of South Pasadena smoking a cigarette when he heard a scream. It was a female voice and it was coming from below him, near the area by the horse trail. After the third scream, Aston “realized something was going on” and, as he heard a fourth scream, he got up and walked south on the Arroyo to try to determine where the screams were coming from. He followed the foot path, which goes down into the Arroyo, meets the horse trail and goes through a tunnel under the freeway. There is, however, a lot of shrubbery in the area and Aston could not see past it.

Aston remained on the foot path until the woman’s screams turned to cries for “ ‘Help.’ ” Aston then ran down the embankment. When he heard a second scream for “ ‘Help,’ ” Aston called out, “ ‘Are you Okay?’ ” and “ ‘I’m coming.’ ” As he ran down

the horse trail, he “stopped because [he saw Barrios] walking [about 10 feet away,] northward.” After making eye contact with Aston, Barrios pulled his hood down so that it covered his face, then kept on walking through the tunnel. When Aston asked Barrios “ ‘What’s going on?’ ” Barrios failed to respond, then started to run. Aston chased Barrios through the tunnel while yelling, “ ‘Hey you stop that’ ” or “ ‘You get back.’ ”

When Barrios continued to run, Aston decided to stop chasing him. It occurred to Aston that he “didn’t know who [he] was chasing” or “what [he] was dealing with. [He] didn’t know what was happening, if [Barrios] had a weapon or not.” Instead, Aston, who had a phone with him, decided to call 911. During the call, he told the operator that “[s]ome guy just attacked a girl” and that he was trying to “follow him.” Aston indicated that Barrios had been wearing “a brown like a flannel shirt, or something like that, long sleeved[,]” and that he was “Caucasian[,] [a]bout maybe 5ft 11, [and] he had a beanie hat on.” When asked about the girl, Aston stated: “I didn’t see her. I just heard her screaming for help.”

Approximately one hour after he made the 911 call, Aston was asked to go to the “wash” by the horse ranch to identify the man he had seen running up the tunnel. Aston identified Barrios. At a later hearing, Aston identified Barrios’s plaid jacket and again identified Barrios as the man he had chased to the tunnel.

At approximately 1:45 p.m. on January 24, 2011, South Pasadena Police Officer Spencer Louie was in the vicinity of Arroyo Park in the City of South Pasadena. He was “[a]ssisting other officers in attempting to locate an attempt rape suspect.” About a half mile from where the 110 Freeway meets the horse trail, Louie “saw [Barrios] with his shirt over his head.” When Barrios revealed his face and hair, Louie realized that he met the description of the suspect. Louie yelled to Barrios and told him to “come over here.” Barrios, who looked “disoriented” and “confused,” complied with the order. Louie eventually placed Barrios in handcuffs.

Detective Frank Litterini of the South Pasadena Police Department also responded to the radio call concerning the attempted rape in the Arroyo Park area. Litterini recovered a “jacket” with a dark gray or black hood that had been “stuffed on top of some

bushes in a wooded area.” Litterini indicated that the place where he found the jacket is “kind of a dark area,” near the “racket center” and the tunnel runs below it.

Litterini read to Barrios his *Miranda*<sup>2]</sup> rights. Although he did not think that Barrios was under the influence of drugs, alcohol or medication, during his interview of Barrios, Letterini asked him if he was under the influence of any of those substances.

## *2. Procedural history.*

Following a preliminary hearing, on September 20, 2011 Barrios was charged by amended information with one count of attempted forcible rape in violation of sections 664 and 261, subdivision (a)(2) (Count 1) and assault with intent to commit a felony in violation of section 220, subdivision (a)(1) (Count 2).

Trial was by jury. Prior to trial, the People indicated they would be seeking to present evidence of D.J.’s statements made to Terry Green on the theory they amounted to “fresh complaint[s].” Defense counsel objected, indicating that, not only was the evidence hearsay, but that it would be cumulative and more prejudicial than probative under Evidence Code section 352.<sup>3</sup> The prosecutor argued that he would not allow the witness to “give significant details.” He simply wanted to show the victim’s demeanor and the “general nature of the conduct.” The trial court indicated it would allow the evidence as the prosecutor had described it.

The prosecutor next argued that Aston’s 911 call was admissible as a contemporaneous statement “because he [was] under the stress of the situation” when he made it. The trial court indicated that, although the 911 tape would be admitted, the transcript of the tape would be “just to aid the jury.” The trial court indicated that it would give a limiting instruction indicating that the tape was the evidence and was being

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<sup>2</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>3</sup> Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

offered to show “state of mind,” “not for the truth of the matter[.]” Before playing the tape, the trial court instructed the jury: “The portions that describe—let me say it this way. Any portion of the 911 call which describes what the witness is actually seeing at that time is being admitted for all purposes. Any other portions are admitted for state of mind only.”

The prosecutor indicated that the other Evidence Code section 402<sup>4</sup> issue was “prior identifications by both [Aston] and the victim.” The prosecutor’s basis for admitting the evidence was that Aston and D.J. had identified Barrios both in the field and at the preliminary hearing. The trial court indicated that “the field [identifications were] clearly admissible.” The second identifications could be argued, if need be, at trial.

The prosecutor asserted that he had a specific photograph which he was intending to use as an exhibit since it showed all the dirt and debris on Barrios’s pants and, in particular, that Barrios had trimmed off all of his hair. The problem was that the photograph showed Barrios standing in front of a police car with his hands behind his back, making the image somewhat prejudicial. The trial court indicated that it believed the photograph was relevant and admissible. It suggested, however, that the prosecutor “copy it so [that] the car [was] not quite so visible.”

After the presentation of the prosecution’s evidence, defense counsel indicated that it was his “professional opinion as [Barrios’s] attorney that he not testify.” Counsel continued: “I’ve spoken with him regarding this. I understand that he has the right to make that decision. At this juncture I would ask the court [to] inquire whether he would like to go against my advice and testify or allow the case to proceed with him invoking

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<sup>4</sup> Evidence Code section 402 provides: “(a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article. [¶] (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests. [¶] (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.”

his right to remain silent.” After some discussion, during which Barrios kept “saying different things,” he ultimately decided not to testify.

When the People had completed their case, defense counsel made a motion for a judgment of acquittal pursuant to section 1118.1. Defense counsel argued: “I believe the evidence is not sufficient to show the People’s charges. I think the more appropriate charges would be what I’ve suggested in terms of the simple battery and simple assault. According to the witness she indicated her pants were simply pulled, no—minor minor injuries. I believe this would be more attune to an assault and battery versus the more serious charges alleged.” The trial court denied the motion, indicating that there was sufficient evidence from “which the jury [could] rely to find the charges alleged by the People.”

Following argument by the prosecutor and defense counsel and instructions from the trial court, the jury began its deliberations. After one day, it was necessary to substitute in an alternate juror and the deliberations began again. Earlier deliberations were disregarded and the case was decided as if the earlier deliberations had not taken place.

Sometime later, the trial court received a message from the foreperson that a verdict had been reached. The foreperson handed the verdict forms to the bailiff, who handed them to the trial court. The court clerk then read the forms into the record as follows: “ ‘We the jury in the above-entitled action find the defendant Jason Daniel Barrios guilty of the crime of attempted forcible rape in violation of Penal Code section[s] 664/261[, subdivision] (a)(2), a felony, as charged in Count 1 of the information. This 23rd day of September, 2011 . . . . [¶] Same title, same title court and case. [¶] ‘We . . . the jury in the above-entitled action find the defendant Jason Daniel Barrios guilty of the crime of assault with intent to commit a felony in violation of Penal Code section 220[, subdivision] (a)(1), a felony, as charged in Count 2 of the information. This 23rd day of September, 2011 . . . .’ ” The jury was polled and each juror indicated that those had been his or her verdicts.



Barrios was sentenced on September 30, 2011. After indicating that Count 1 and Count 2 were “654,”<sup>5</sup> the trial court indicated that, since Count 1 was an attempt, the maximum sentence which could be imposed was four years. Count 2, on the other hand, had a sentencing range of “2, 4 and 6.”

The prosecutor asserted that there were multiple circumstances in aggravation, including the “threat of great bodily harm to the victim,” a “high degree of callousness,” that the “victim was particularly vulnerable considering the circumstances of this case” and that “there [had been] some planning and sophistication in the sense that Mr. Barrios did target this particular victim.” In addition, the prosecutor noted that Barrios did not seem “to be a stable person.” The prosecutor continued: “I believe he poses a serious risk to public safety. . . . Insanity was not a defense and [defense counsel] who is a calming influence could not keep Mr. Barrios from controlling himself during trial. He had multiple outbursts. I don’t think this is someone who can control themselves. . . . I feel the high term is appropriate.”

Julia Barrios, Barrios’s mother, then addressed the court. She stated: “My son needs medical attention that I personally believe would not be given to him in prison. [¶] On June 24th 2011 he was evaluated by a psychiatrist and moved from the central jail to the Twin Towers medical facility . . . . He is currently being treated for anxiety, depression and schizophrenia. I have him currently on my medical insurance at work and if he is released for time served or put on probation I can get him the medical attention needed . . . . [¶] My son is quiet. He has shown moralities [*sic*] and emotions incapable of harming others.” She explained that he had been the “man of the house since [her] ex-husband abandoned [them] many years ago” and that he had “always been there to give a helping hand.” In addition, Mrs. Barrios claimed that neither D.J. nor Aston had given an

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<sup>5</sup> Section 654 provides in relevant part: “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

accurate description of her son and that “this [was] a case of mistaken identity.”

Mrs. Barrios indicated that her son had been “at the wrong place and at the wrong time.”

Defense counsel argued that, “based on all of the circumstances,” Barrios should be sentenced to the low term. Counsel indicated that “[h]e is a young man” and “[h]e has no prior criminal history.” Counsel stated that, although the charges of which he was convicted are “very serious,” the testimony of the victim indicated that she was “never hit,” “never struck” and “never [verbally] threatened.” Moreover, Barrios never touched D.J.’s breasts or genitals.

After considering the emotional harm suffered by the victim, the fact that the crime was committed in an area populated by children, walkers, runners and others who should have the luxury of feeling safe there, and that Barrios, although young, is not a juvenile, the trial court sentenced him to the mid-term of four years in state prison as to Count 2. As to Count 1, the trial court imposed, then stayed pursuant to section 654, the mid-term of three years.

Barrios was awarded presentence custody credit for 250 days actually served and 37 days of conduct credit, or 287 days. He was ordered to pay a \$200 restitution fine (§ 1202.4, subd. (b)), a suspended \$200 parole revocation restitution fine (§ 1202.45), a \$40 court security fee (§ 1465.8, subd. (a)(1)) and a \$30 criminal conviction assessment (Gov. Code, § 70373). The trial court then ordered Barrios to register as a sex offender upon his release from custody, each time he changed his residence and each year with five days of his birthday. Although he was sentenced to prison “[f]orthwith,” the trial court recommended that he be housed in a mental health treatment facility.

On September 30, 2011, the day of sentencing, Barrios filed a notice of appeal. He indicated that he is indigent and requested the appointment of counsel. This court appointed counsel to represent Barrios on appeal on January 23, 2012.

### **CONTENTIONS**

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed April 11, 2012, the clerk of this court advised Barrios to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

**REVIEW ON APPEAL**

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.